Greenfield, California

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

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| SCHEID VINEYARDS AND MANAGEMENT COMPANY, INC., Respondent And UNITED FARM WORKERS OF AMERICA, AFL-CIO, Charging party | ) | Case Nos. 92-CE-51-SAL<br>92-CE-lll-SAL<br>92-CE-113-SAL<br>93-CE-l-SAL<br>93-CE-ll-SAL<br>93-CE-27-SAL<br>93-CE-67-SAL<br><br>21 ALRB No. 10<br>(October 24, 1995) |

DECISION AND ORDER

On November 14, 1994, following an evidentiary hearing, Administrative Law Judge (ALJ) Douglas Gallop issued the attached Decision and Recommended Order in this matter. In his decision, the ALJ found that Scheid Vineyards and Management Company, Inc. (Respondent, Employer or Scheid) had made a number of unilateral changes in hiring, recall and layoff practices, in violation of section 1153 (e) and (a) of the Agricultural Labor Relations Act (ALRA or Act). He also found that Respondent had in a number of instances refused to recall certain employees because of their protected concerted activities, in violation of section 1153 (c) and (a) of the Act. However, the ALJ dismissed some of the allegations of discrimination as unproven and dismissed others as cumulative .

Thereafter, General Counsel and Scheid filed timely exceptions to the ALJ's Decision along with supporting briefs, and both parties filed reply briefs. The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the

ALJ's Decision in light of the exceptions and briefs of the parties and has decided to affirm the rulings, findings and conclusions of the ALJ" except to the extent they are inconsistent herewith, and to adopt his Recommended Order, as modified.

I. Failure to Bargain About Layoffs of Argueta, Perez, Rosas and Serrato in May 1993 and Layoff of Mayorga in November 1993

a) Testimony and ALJ Decision

Respondent's General Manager, Kurt Gollnick, testified that he laid off about twenty employees (including Juana Argueta Gutierrez (Argueta), Teresa Perez, Irma Rosas and Lucina Serrato) in May 1993 because suckering and training were finished and work was winding down. The four employees, who had been training and suckering in Baltazar Chairez' crew, were transferred to Gustavo Diaz' crew for one day to finish up some training. About a day later, the Diaz crew was laid off. Gollnick stated that it is typical for him, as he is winding up a season, to take advantage of excess labor for a day or two to do pick up work. Respondent was moving on to other work such as replanting and controlling gophers, for which the four employees were not best suited in terms of productivity, experience and skills.

Luis Mayorga testified that he had worked for Scheid in pruning, suckering, irrigation, hoeing, tractor driving, and gondola work (i.e., driving a tractor with a gondola attached). He was laid off in November 1993 after the harvest for about two weeks.

The ALJ concluded that Respondent had violated section 1153 (e) and (a) of the Act by failing to give the United Farm

Workers of America, AFL-CIO (UFW or Union) notice and the opportunity to bargain about layoffs following the 1992 and 1993 harvest seasons[1] and the 1993 suckering and training season.

b) Analysis

In *NLRB* v. *Katz* (1962) 369 U.S. 736 [50 LRRM 2177], the U.S. Supreme Court held that it is a per se violation of the duty to bargain for an employer to make a unilateral change in terms and conditions of employment without bargaining with the union certified to represent its employees. The employer in *Katz* had unilaterally granted merit increases to certain employees in the unit. The employer argued to the court that the raises were in line with the company's long-standing practice of granting quarterly or semi-annual merit reviews and thus, in effect, were a mere continuation of the status quo. The court conceded that the implementation of a merit raise which is simply an automatic increase to which an employer has already committed itself might not constitute a bargaining violation. However, because the raises in *Katz* were in no sense automatic, but were informed by a large measure of discretion, the court concluded that the increases constituted an unlawful unilateral change. *(Id.,* 50 LRRM at 2182 . )

This Board has long followed *Katz* and other National Labor Relations Act (NLRA) precedent holding that during the

[1] This conclusion appears to be an error, since the only layoffs alleged as violations in the complaint were the May 1993 layoffs of the four named employees and the November 1993 layoff of Mayorga.

pendency of election objections (or, *as* in this case, after Board certification of the union as the bargaining representative of the employer's employees, and while the employer is "technically" refusing to bargain in order to challenge the certification in court)[2] an employer is not under an obligation to bargain toward a comprehensive collective bargaining agreement. However, the employer does have a duty to notify and bargain with the union before instituting any changes in wages, hours or working conditions of its employees. *(Highland Ranch* v. *Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848 [176 Cal.Rptr. 753]; *Signal Produce Company* (1980) 6 ALRB No. 47; *Thomas S. Castle Farms, Inc.* (1983) 9 ALRB No. 14; *Masaji Eto, dba Eto Farms* (1980) 6 ALRB No. 20.)[3]

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[2] The election herein was conducted on February 26, 1992, and the Board's certification issued April 30, 1992. On May 7, 1992, Scheid informed the UFW that it was refusing to bargain in order to test the certification by judicial review. In *Scheid Vineyards and Management Company, Inc.* (1993) 19 ALRB No. 1, the Board found that Respondent had violated section 1153(a) and (e) of the Act by its refusal to bargain. Respondent took its challenge through the courts until April 13, 1994, when its petition for review was denied by the California Supreme Court. The parties first met in negotiations on May 18, 1994. The layoffs in question occurred in May and November 1993.

[3] Respondent argues that under the Board's decision in Grow-Art (1983) 9 ALRB No. 67, it would have jeopardized its legal position in challenging the Board's certification if it had offered to bargain about unilateral changes. Respondent claims that the Board's decision in Gerawan *Ranches* (1992) 18 ALRB No. 16 modified the law in holding that an employer does not waive its right to challenge a certification by engaging in the limited bargaining that is required before making a change in an existing term or condition of employment subject to mandatory bargaining. However, Respondent misreads both of these Board decisions. *Grow-Art* did not involve a technical refusal to bargain. Rather, the employer in *Grow-Art* undertook full-scale

(continued...)

Scheid argues that its May 1993 layoffs of Argueta, Perez, Rosas and Serrato and its November 1993 layoff of Mayorga were entirely consistent with its past practice of laying off employees at the end of a season. Scheid concedes, however, that it does not follow strict seniority in implementing layoffs. The ALJ found that Scheid does not necessarily lay off all employees on the same date, and that some employees are retained after the general seasonal layoffs according to their skills, experience and productivity.

National Labor Relations Board (NLRB) cases subsequent to *Katz* have emphasized that the long-standing (or past) practice exception (under which an employer attempts to demonstrate that its actions were a mere continuation of the status quo) places a heavy burden on the employer to show an absence of employer discretion in determining the size or nature of a unilateral employment change. *(Aaron Brothers Co.* v. *NLRB* (9th Cir. 1981) 661 F.2d 750, 753 [108 LRRM 3062].) In *Local 512, Warehouse and Office Workers' Union v. NLRB (Felbro, Inc.)* (9th Cir. 1986) 795 F.2d 705 [122 LRRM 3113], the Ninth Circuit Court of Appeals doubted that the *Katz* "longstanding practice" exception could ever apply to an economic layoff, since economic layoffs "would

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[3](...continued)
bargaining following an election and then, five months later, sought to back away from bargaining and attack the election. The Board held that the employer had forfeited its right to object to the election by not timely making its challenge. In *Gerawan,* the Board applied its longstanding rule of law that even while engaged in a technical refusal to bargain, an employer must bargain with the union about any proposed unilateral changes in terms and conditions of employment.

seem to be inherently discretionary, involving subjective judgments of timing, future business, productivity and reallocation of work." (Id., 795 F.2d at 711.)

In *Adair Standish* Corp. v. *NLRB* (6th Cir. 1990) 912 F.2d 854 [135 LRRM 2382], the employer had an existing layoff policy under which the company laid off employees based on subjective assessments of merit rather than seniority or some other objective criterion. After an election in which a union was selected to represent Adair's employees, the company continued unilaterally to apply its layoff policy. The company argued that its postelection policy amounted to nothing more than a permissible continuation of the status quo under *Katz.* However, the Sixth Circuit found that the *Katz* exception was not applicable because layoffs under Adair's practice prior to the election were not systematic, but rather were *ad hoc* and highly discretionary. *(Id.,* 135 LRRM at 2390.)

In *NLRB* v. Frontier Homes *Corporation* (8th Cir. 1967) 371 F.2d 974 [64 LRRM 2320], the employer was engaged in a seasonal industry which regularly laid off a substantial number of workers. Its past practice had been to lay off workers strictly on the basis of their seniority. The court found that the employer committed an unlawful unilateral change by departing from its past practice when it decided to rate the abilities of each worker before implementing a layoff after expiration of the bargaining contract. The court noted, however, that the employer probably would have been justified in following its long-

established practice of strict seniority layoff without consulting the union, as a "mere continuation of the status quo" under *Katz. (Id.,* 371 F.2d at 980.)

Scheid acknowledges that it does not follow strict seniority in executing layoffs, and that it exercises considerable discretion in determining which employees to retain for other work assignments when it implements its end-of-season layoffs. We do not mean to suggest, however, that Scheid could lawfully have discontinued its existing, discretionary layoff policy and instituted a strict seniority layoff policy without bargaining with the Union. In *The Daily News of Los Angeles* (1994) 315 NLRB No. 158 [148 LRRM 1137], the employer had maintained an established practice of granting merit raises that were fixed as to timing but discretionary in amount. The NLRB held that the employer had acted unlawfully in unilaterally withholding annual merit wage increases from employees during negotiations with the union for an initial contract. *(Id.,* 148 LRRM at 1138.) Thus, the employer could not lawfully discontinue its discretionary merit system without bargaining. What was required, the NLRB held, was

> a maintenance of preexisting practices, i.e., the general outline of the program[;] however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases) becomes a matter as to which the bargaining agent is entitled to be consulted.

With the exception of the decision to lay off itself, Scheid's end-of-season layoffs herein were in no sense "automatic" within the *Katz* exception, since they involved

considerable discretion by the Employer in their implementation. We hold, therefore, that Scheid's May 1993 layoffs of Argueta, Perez, Rosas and Serrato, as well as the November 1993 layoff of Mayorga, constituted unlawful unilateral changes over which the Employer was required to notify and offer to bargain with the UFW.

In our remedial order, we will order Respondent to cease and desist from unilaterally laying off employees without providing the UFW with notice and the opportunity to bargain concerning the discretionary implementation of its decision to lay off employees and the effects of that decision. We will also order Respondent to bargain with the Union about the discretionary implementation of layoff decisions and their effects. However, we will not order Respondent to pay backpay to the employees who were seasonally laid off.[4] In the circumstances of this case, we believe such a backpay award would be highly speculative, since it would be impossible to determine whether bargaining with the Union before the layoffs would have resulted in layoffs of the same employees, different employees, or fewer employees.

II. Failure To Recall Argueta, Perez. Segura, Sosa And Rosas For Pruning And Tying, Beginning With The 1992-1993 Season

Juana Argueta, Teresa Perez, Irma Rosas, Leslie Sosa and Martha Segura Alvarez (Segura) all had extensive experience

[4] Although the ALJ believed that backpay would be appropriate for seasonal employees who were laid off, he did not include that remedy in his proposed order.

in pruning and/or tying operations with Respondent. Beginning with the 1992 pruning season, however, Kurt Gollnick instituted a new policy of requiring a minimum experience of 400 hours' pruning experience over the prior two years. Respondent did not deny that Argueta, Rosas and Sosa lost work as a result of this policy.

The ALJ found that the changed recall policy had a general impact on the bargaining unit and thus required giving notice and an opportunity to bargain to the UFW. He therefore concluded that Respondent had violated section 1153 (e) and (a) of the Act by unilaterally changing its recall policy for the 1992 pruning season. He found that Argueta, Sosa[5] and Rosas were entitled to backpay if employees with less classification seniority were recalled or hired for pruning. He found that Perez and Segura had not been affected by the change in policy because neither had performed pruning work during the prior season. Since they were thus not eligible for recall under Respondent's former policy, the ALJ dismissed the allegations regarding these two employees.

The ALJ noted that other employees may not have been recalled for pruning work, in violation of Respondent's preexisting recall policy. However, he found that only the named

[5] The ALJ here referred to Perez when he apparently meant to refer to Sosa. He later dismissed the allegations regarding Perez, and his proposed order correctly includes a remedy for Sosa, not Perez.

employees were entitled to a remedy, absent an amendment to the complaint.

We affirm the ALJ's conclusion that Gollnick's determination to apply a "benchmark" requirement of 400 minimum hours of pruning experience in the prior two years for eligibility for recall in the 1992 season constituted an unlawful unilateral change in hiring practices. However, we overrule the ALJ's recommendation to limit backpay recovery to only those named employees who filed charges. We conclude that any employees who can demonstrate during compliance proceedings that they would have been recalled for the 1992 pruning season if Respondent had not instituted its new 400-hour requirement should be permitted to claim backpay Such claims can easily be resolved in compliance without the necessity of full litigation in an unfair labor practice hearing.

III. Alleged Discriminatory Basis For Respondent's Employment Decisions

a) Failure to Assign Gondola Driving Duties to Mayorga

The ALJ concluded that Respondent had discriminated against Mayorga because of his union activities when it took away his gondola tractor driving duties in 1992 and 1993. Respondent argues that the ALJ should not have made any ruling regarding 1993 gondola work because the complaint alleged a violation only as to 1992. However, we note that the complaint also alleged that Mayorga's hours had been reduced since October 23, 1992, and Mayorga did testify that he was denied gondola work in both August 1992 and August 1993. Thus, we find that the issue of

1993 gondola work was sufficiently addressed in the complaint and in the testimony to justify the ALJ's ruling.

Respondent also asserted that Mayorga suffered no harm from the denial of gondola work because he worked virtually the same number of hours in August, September and October 1992 as he worked during those months in 1991, and his earnings actually increased due to a pay raise. However, we note that it is not necessary to demonstrate an economic loss in order to establish unlawful discrimination. If the discrimination is motivated by an anti-union purpose and has the foreseeable effect of either encouraging or discouraging union membership, it violates the Act. (*Retail Clerks Union, Local 770* (1974) 208 NLRB 356 [85 LRRM 1082].) Since Mayorga generally performed gondola work at night or during the evening on days when he performed other jobs during the day, it was reasonably foreseeable that he would work fewer hours when the gondola work was taken away from him.

We therefore affirm the ALJ's conclusion that Respondent discriminatorily denied Mayorga gondola tractor driving work because of his protected concerted activities.

b) "Cumulative" Allegations of Discrimination

The ALJ declined to rule on some of the allegations of discrimination, instead dismissing them as "cumulative" or "duplicative" of the bargaining violations.[6] We find that none

[6] The Board strongly urges ALJ's to make findings on all of the charges before them. As General Counsel points out in his exceptions brief, an allegation may no longer be "cumulative" or "duplicative" if an appellate court reverses a finding on the initial allegation.

of the allegations so dismissed by the ALJ are meritorious, and we therefore dismiss them on the merits.

Thus, although we have concluded that Respondent violated section 1153 (e) and (a) of the Act by unilaterally changing its recall policy for the 1992 pruning season, we do not find that the new requirement of 400 hours of pruning experience was discriminatorily implemented specifically to avoid recalling Rosas and Sosa for the pruning season. There was no evidence that Respondent's failure to rehire those two employees was the result of discrimination rather than simply the result of the unilateral implementation of a new work requirement, and the allegation is therefore dismissed on the merits.

Similarly, we dismiss on the merits the allegation that the layoff of employees after the 1993 suckering/training season was discriminatory, because the evidence demonstrated that the layoffs were consistent with Respondent's use of discretion in evaluating its employees' skills in determining whom to lay off at the end of a season. General Counsel failed to show that the retention of a few "more qualified" employees in May 1993 for shovel replanting was discriminatory towards those employees not retained. Rather, the evidence indicated that Respondent retained for planting those employees whom it believed to be experienced and well-qualified for the job.

Further, we dismiss on the merits the allegation that Mayorga's November 1993 seasonal layoff was discriminatory. This layoff (which lasted only a little longer than two weeks) was

consistent with Respondent's past practice of using its discretion in laying off employees at the end of a season. There is no evidence in the record that this brief layoff of Mayorga was motivated by discrimination rather than by Respondent's unilateral determination that it needed fewer employees, and that Mayorga's skills were not best suited to any work that remained.

## ORDER

By authority of Labor Code section 1160.3, the agricultural Labor Relations Board (Board) hereby orders that Respondent Scheid Vineyards and Management Company, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code section 1155.2(a), on request, with the United Farm Workers of America, AFL-CIO (UFW), as the certified collective bargaining representative of Respondent's agricultural employees.

(b) Instituting or implementing any changes in hiring or recall policies, without first notifying and affording the UFW a reasonable opportunity to bargain with Respondent concerning such changes.

(c) Unilaterally laying off employees, without providing the UFW with notice and the opportunity to bargain concerning the discretionary implementation of its decision to lay off employees, and the effects of that decision.

(d) Refusing to rehire, reducing the hours, changing job duties, or otherwise discriminating against any agricultural employee because of membership in or support of the UFW, or any other labor organization.

(e) In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees.

(b) Upon request of the UFW, rescind the unilateral changes in hiring and recall policies.

(c) Upon request, meet and bargain collectively in good faith with the UFW, concerning the changes in recall policy; the use of labor contractors to perform bargaining unit work; and the discretionary implementation of its decision to lay off employees and the effects of the decision.

(d) Reinstate Luis Mayorga to his former position of employment (i.e., gondola tractor driver during the harvest season), or if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges of employment.

(e) Reinstate Martha Segura Alvarez to her former position of employment, or if her position no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges of employment.

(f) Make whole all employees who have not been recalled for work in the Paicines area fields in accordance with their classification seniority, during the 1992 suckering and training season, and thereafter, for all losses in wages and other economic losses they suffered, until such time as Respondent negotiates to agreement or impasse with the UFW, or the UFW fails to timely request bargaining, plus interest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5.

(g) Make whole all employees who were not recalled for employment during the 1992 harvest season, in accordance with their classification seniority, for all losses in wages and other economic losses they suffered, for the duration of the 1992 harvest season, plus interest.

(h) Make whole for all losses in wages and other economic losses they suffered, plus interest, all employees who were not recalled for pruning work in accordance with classification seniority, commencing with the 1992 - 1993 season.

(i) Make whole Luis Mayorga for all losses in wages and other economic losses he suffered as the result of being removed from gondola tractor driving duties, plus interest.

(j) Make whole Martha Segura Alvarez for all losses in wages and other economic losses she suffered as the result of not being rehired, commencing with the 1992 harvest season, plus interest.

(k) Preserve and, upon request, make available to the Board or its agents for examination, photocopying, and otherwise copying, all payroll records, social security payment records, time cards, personnel records and reports and all other records relevant and necessary to a determination, by the Regional Director, of the backpay and makewhole period and the amount of backpay and makewhole due under the terms of this Order.

(l) Sign the attached Notice to Agricultural Employees, and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(m) Mail copies of the attached Notice, in all appropriate languages, within thirty days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from February 1, 1992, until January 31, 1993 .

(n) Post copies of the attached Notice, in all appropriate languages, for sixty days in conspicuous places on its property, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to

replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

(o) Arrange for a Board agent to distribute and read the attached Notice in all appropriate languages to the assembled employees of Respondent on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and during the question-and-answer period.

(p) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps which have been taken to comply with its terms . Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with the terms of this Order, until full compliance is achieved.

DATED: October 24, 1995

MICHAEL B. STOKER, Chairman

IVONNE RAMOS RICHARDSON, Board Member

LINDA A. PRICK, Board Member

CASE SUMMARY

Scheid Vineyards and Management Company, Inc. (UFW)

21 ALRB No. 10
Case Nos. 92-CE-51-SAL
92-CE-lll-SAL
92-CE-113-SAL
93-CE-l-SAL
93-CE-ll-SAL
93-CE-27-SAL
93-CE-67-SAL

Background

The complaint herein alleged that Respondent violated the ALRA by unilaterally changing its hiring and recall procedures without notification to or bargaining with the certified bargaining agent, United Farm Workers of America, AFL-CIO (UFW). The complaint also alleged that Respondent discriminatorily laid off, refused to recall, reduced hours, and changed the job duties of certain employees because of their protected concerted activities.

ALJ Decision

The ALJ found that Respondent had unlawfully changed its hiring practices by hiring new, local employees for the 1992 suckering/training season in Paicines instead of recalling employees by classification seniority, without notifying or offering to bargain the change with the UFW, in violation of section 1153 (e) and (a) of the ALRA. He also found that Respondent had violated section 1153(e) and (a) by engaging a labor contractor in the September 1992 grape harvest instead of using regular employees, without notifying or bargaining with the UFW. The ALJ dismissed allegations that Respondent had changed its recall policy by not recalling three employees for the 1992 grape harvest, as he found that the three employees were not eligible for recall. The ALJ found that Respondent had unlawfully changed its recall policy for the 1992-1993 pruning and tying season without notifying or offering to bargain with the UFW, and that three named employees were entitled to backpay if employees with less classification seniority had been recalled or hired for pruning. The ALJ also found that Respondent had unlawfully failed to notify the UFW and offer to bargain about layoffs following the 1992 and 1993 harvest seasons and the 1993 suckering and training season. However, he dismissed allegations that Respondent had violated the ALRA by failing to give notice that a single employee's hours had been reduced and his tractor driving duties had been eliminated, since the change did not impact the bargaining unit generally.

The ALJ dismissed all but two of the allegations that Respondent's employment decisions were the result of unlawful discrimination in retaliation for union activities and other protected activities. Thus, the ALJ found that Respondent had

refused to rehire an employee for the 1992 harvest season because of her union activities, and had denied gondola tractor driving work to another employee because of his protected concerted activities. The ALJ declined to rule on some of the allegations of discrimination, instead dismissing them as cumulative or duplicative of the bargaining violations alleged.

Board Decision

The Board affirmed the ALJ's conclusions that the seasonal layoffs of certain employees were unlawful, finding that the seasonal layoffs involved considerable discretion by the Employer and required the Employer to notify the union and provide the opportunity to bargain over implementation of the layoff policy. However, the Board declined to order backpay for the seasonally laid off employees, finding that the determination of the amounts of backpay owed, as well as the particular persons to whom such backpay would be due, would be highly speculative. The Board affirmed the ALJ's ruling that one employee's reduction in work hours was not bargainable.

The Board upheld the ALJ's determination that Respondent had unlawfully changed its hiring practices by hiring local employees in Paicines in 1992 instead of recalling regular employees, and by engaging a labor contractor for the September 1992 grape harvest. The Board also affirmed the ALJ's dismissal of the allegations that Respondent unlawfully failed to recall three named employees for the 1992 grape harvest. The Board affirmed the ALJ's determination that Respondent had unlawfully changed its recall policy by failing to recall pruning and tying workers for the 1992-1993 season, but ruled that backpay could be claimed by any employees who could demonstrate during compliance proceedings that they would have been recalled if Respondent had not instituted its new requirements.

The Board upheld the ALJ's dismissal on the merits of certain allegations of discriminatory actions by Respondent, as well as his conclusions that Respondent had discriminatorily refused to rehire one employee for the 1992 harvest season and discriminatorily taken gondola tractor driving duties away from a single employee. However, the Board concluded that none of the allegations of discrimination which the ALJ dismissed as cumulative were meritorious, and it therefore dismissed them on the merits.

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# NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges filed in the Salinas Regional Office by the United Farm Workers of America, AFL-CIO (UFW), the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing in which each side had a chance to present evidence, the Board has found that we violated the Agricultural Labor Relations Act (Act) by changing some of our hiring and recall policies without first notifying and/or bargaining with the UFW as your representative, and by failing to give the UFW notice or the opportunity to bargain concerning the layoffs of employees. The Board also found that we violated the Act by discriminating against an employee, by refusing to rehire her, and another employee, by removing work previously assigned to him, because these employees joined, supported and/or assisted the UFW.

The ALRB has told us to post and publish this NOTICE.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California these rights:

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you or to end such representation;
4. To bargain with your employer about your wages and working conditions through a bargaining representative chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

WE WILL NOT do anything in the future which forces you to do, or stops you from doing, any of the things listed above.

WE WILL NOT make any changes in your wages, hours or working conditions, or use labor contractors to furnish employees for the grape harvest or lay off any of our agricultural employees without notifying the UFW and giving it an opportunity to bargain about, such changes and layoffs.

WE WILL NOT refuse to rehire, take away job assignments or otherwise discriminate against any agricultural employee because he or she belongs to or supports the UFW, or any other union.

WE WILL rescind our policies of not recalling employees in accordance with classification seniority for work in the Paicines area fields, and requiring 400 hours of experience in the prior two seasons to be eligible for recall to pruning work, until we have negotiated those policies with the UFW, on its request.

WE WILL recall employees for employment in accordance with their classification seniority, unless we notify the UFW of a different policy and negotiate the new policy with it.

WE WILL reimburse employees for all losses in pay or any other economic losses they suffered as a result of our failure to bargain with the UFW, plus interest.

WE WILL offer Martha Segura Alvarez employment, and restore Luis Mayorga to his former position as a gondola tractor driver,- and we will reimburse them for all losses in pay or other economic losses they suffered, plus interest.

Dated: SCHEID VINEYARDS AND MANAGEMENT COMPANY, INC.

By:. _____

(Representative) (Title)

If you have any questions about your rights as farm workers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907-1899. The telephone number is (408) 443-3161.

DO NOT REMOVE OR MUTILATE

STATE OF CALIFORNIA

AGRICULTURAL LABOUR RELATION BOARD

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| In the Matter of: | ) | Case Nos. 92-CE-51-SAL |
| | ) | 92-CE-lll-SAL |
| SCHEID VINEYARDS AND MANAGEMENT COMPANY, INC. | ) | 92-CE-113-SAL |
| | ) | 93-CE-l-SAL |
| Respondent, | ) | 93-CE-ll-SAL |
| | ) | 93-CE-27-SAL |
| and | ) | 93-CE-67-SAL |
| | ) | |
| UNITED FARM WORKERS OF AMERICA, AFL-CIO, | ) | |
| | ) | |
| Charging Party. | ) | |

Appearances:

Randolph G. Roeder and John M. Phelan
Littler, Mendelson, Fastiff,
Tichy & Mathiason
San Francisco, California
for the Respondent

Mary L. Mecartney
Marcos Camacho, A Law Corporation
Keene, California
for the Charging Party

Eugene Cardenas
Salinas Regional
Office Salinas, California
for the General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: This hearing was conducted before me on August 16, 17, 18 and 19, 1994, at Salinas, California.

The case arises from charges filed by United Farm Workers of America, AFL-CIO (hereinafter Charging Party or UFW) alleging that Scheid Vineyards and Management Company, Inc. (hereinafter Respondent) violated sections 1153 (a) , (c) , (d) , and (e) of the Agricultural Labor Relations Act (hereinafter Act) by various alleged acts of discrimination and unilateral changes in working conditions. A complaint issued, which was twice amended, alleging the violations.[1] Respondent filed an answer to the Second Amended Consolidated Complaint (hereinafter complaint), denying the commission of unfair labor practices.

Upon the entire record, including my observations of the witnesses, and after careful consideration of the briefs filed b" General Counsel and Respondent, and the arguments made at the hearing, I make the following findings of fact and conclusions of law.

## FINDINGS OF FACT

### I. Jurisdiction

The charges were filed and served on Respondent on various dates between May 20, 1992 and November 19, 1993. Respondent is a California corporation engaged in the cultivation of grapes, with an office and principal place of business located in Greenfield,

[1]The charge in Case No. 92-CE-114-SAL, and a portion of the charge in Case No. 92-CE-115-SAL, were severed from this proceeding by order of the Board dated September 13, 1994.

California, and is an agricultural employer within the meaning of §1140.4(c) of the Act. Respondent admits that its Chief Executive Officer, Alfred G. Scheid; Vice-President, Scott D. Scheid; General Manager, Kurt James Despain Gollnick; Supervisors, Guadalupe Rayas Jimenez (Rayas) and Marcelino Torres; and former Head Supervisor, Salvador Valenzuela were at all material times supervisors and agents of Respondent within the meaning of §1140.4(j). Respondent denies that its former employee, David Martinez (who, for workers' compensation purposes, identified himself as Safety Officer); Payroll Clerk, Cynthia Chavez; or Crew Leader/Foreman, Baltazar Chairez have been supervisors or agents.

Respondent admits that the Charging Party is a labor organization. It also admits that Maria Teresa Perez, Juana Argueta Gutierrez (Argueta), Martha Segura Alvarez (Segura), Irma Rosas, Leslie Sosa Flamenco (Sosa), Lucina Serrato and Luis Mayorga have at all material times been agricultural employees under §1140.4 (j).

## II. Background

Respondent cultivates grapes at various locations. Prior to late December 1991, it managed fields located in the Greenfield/San Lucas area. Many, but not all of Respondent's employees work on a seasonal basis. The year begins with pruning and tying, commencing in December or early January and running as late as March. Grape vines are first pruned, then tied. The next major operation is suckering and training, which typically commences in April or May. Suckering is normally completed by

June, while some training work may continue into September. The harvest normally begins in early September and is concluded by mid- or late October.

Many of Respondent's employees are laid off between seasons. Some of Respondent's machine operators, irrigators and other agricultural employees work year-round, with few, if any layoffs. Since the dates of the operations vary, primarily due to the weather, it is impossible to predict exactly when the operations will begin and end. Respondent does not necessarily lay off all employees performing a given operation at the same time. Since Respondent does not use seniority in layoffs, it is impossible to predict who will be laid off on a given date.

After winning an election conducted on February 26, 1992, the Charging Party was certified as the representative of Respondent's agricultural employees, on April 30, 1992. Respondent contested the certification, and refused to bargain with the Charging Party pending the outcome of its challenge. Respondent was found to have violated §1153(a) and (e) by its refusal to bargain, in Scheid Vineyards and Management Company, Inc. (1993) 19 ALRB No. 1. Respondent took its challenge through the courts until the spring of 1994, when its petition for review was denied by the California Supreme Court. The parties first met in negotiations on May 18, 1994.

III. The Alleged Unilateral Changes and Refusals to Bargain

1. The complaint alleges that Respondent unilaterally changed its past practice of recalling employees based on their

seniority by hiring new employees to work the suckering/training season at fields located near Paicines, California. Respondent denies any change in past practice, contends that it notified the Charging Party of its intentions, and faults the Charging Party for the failure of the parties to thereafter meet and negotiate.

As noted above, until late 1991, Respondent had managed fields located in the Greenfield/San Lucas area. Commencing in mid-1991, Respondent engaged in negotiations to manage fields located near Paicines, which would increase its total of managed acreage by about 40%. The negotiations did not proceed smoothly, and even as late as Thanksgiving, it did not appear that a contract would be reached. Respondent commenced its pruning/tying operations at the Greenfield/San Lucas fields in December. During those operations, Respondent entered into an agreement, effective December 30, 1991, to manage the Paicines fields. Since the pruning and tying season was well underway, Respondent was forced to transfer over 100 pruning and/or tying employees from the Greenfield area to Paicines. At least some of these employees finished the season there and were then laid off.

Al Scheid, Gollnick and Rayas testified that the only reason Greenfield area employees were used to work in Paicines was the late notice Respondent received that it would be managing those fields. Otherwise, Respondent would have opened a hiring office in the Paicines area and used local workers. Respondent would have preferred to hire in that manner, because its general policy is to hire locally, and the use of Greenfield area employees

involved an extended commute, potentially on dangerous roads, and also raised the potential of workers' compensation claims and lawsuits, if traffic accidents took place. Thus, the use of Greenfield area employees was intended to be a one-time occurrence.

Irrespective of Respondent's intentions, however, it is clear that they were not communicated to many (if any) unit employees. To the contrary, several worker witnesses credibly testified that when Valenzuela informed groups of them concerning the Paicines work, he in no way indicated it would be limited to the pruning/tying season, and in fact indicated the work would continue into the upcoming seasons.[2] It is equally apparent that Respondent had not informed the Charging Party of the temporary nature of this assignment. With respect to Respondent's alleged general policy to hire locally, this certainly represented a major departure therefrom and, in addition, Respondent has engaged labor contractors to hire unit employees from areas far from Greenfield and Paicines.

General Counsel contends that Respondent generally follows seniority by hire date for employees who have worked the prior season. Respondent contends it selects employees for recall based on a prerequisite that they worked in the same operation during the prior season, and then based on their experience, productivity

[2]Respondent contends this testimony should not be credited, because the witnesses' pre-hearing declarations do not refer to the statements by Valenzuela. The witnesses, however, credibly explained that they were not asked about the statements when they gave their declarations.

and skills. It is undisputed that new employees file written applications for employment, and are required to submit new applications if they do not work for Respondent for over one year. It is also uncontroverted that Respondent contacts employees eligible for recall by telephone, rather than requiring them to contact Respondent. The dispute centers on what factors are used to determine selection for recall.

There was considerable testimony regarding Respondent's recall policy. Gollnick and Rayas testified that recalls are based on productivity, skills and experience. Gollnick makes the final decision as to who should be recalled, but consults with the supervisors concerning skill levels. By experience, Respondent is referring to experience in a particular operation, and not the employee's hire date. Gollnick further testified that employees who do not work for Respondent in a given operation for a season lose their recall rights. Chavez, who is personally involved in recalling employees and answering their questions about the availability of work, testified that Respondent gives a preference in recall to employees who worked the prior season in the operation in question. Chavez was unable to explain how Respondent selects between persons eligible for recall, when insufficient positions exist to recall them all.

The employee witnesses testified that they were repeatedly told by Valenzuela, and based on their own experiences could confirm that employees eligible for rehire are recalled based on seniority. When this issue was discussed with one employee, she

indicated that by seniority, she meant the number of seasons worked performing the operation in question.

Based on all the witnesses' testimony, and a review of Respondent's business records,[3] it is found that Respondent, as of January 1992, maintained a recall policy following classification seniority, provided the employee had performed in a satisfactory manner, unless the recall was to a job function requiring unusual skills and abilities. Recall rights were lost if the employee was not employed in the classification during the preceding season.[4] Contrary to General Counsel's contention, the evidence fails to establish any policy with respect to the rehire of employees, although it may be assumed Respondent would rehire a satisfactory employee if openings existed.

Respondent did not hire Greenfield area employees for the 1992 suckering/training season at the Paicines fields, and

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[3]Both General Counsel and Respondent contend the records support their positions. In fact, the records in evidence do not establish either position. With respect to seniority by hire date, there are several examples where the records show that employees with later hire dates, and even new hires, began seasonal work before more senior employees. The records do not establish Respondent's position, because they refer to the "rehire" of employees, but include recall, rehire and, in some cases, new hires. Also, the records do not show the date Respondent first attempted to contact the employees, whether employees were eligible for recall or only rehire, and cases where employees were unable to report for work at the beginning of the season.

[4]Respondent contends that a letter dated March 11, 1993, from an ALRB Regional Director constitutes an admission that Respondent does not follow seniority. The letter, however, refers to seniority in layoffs, not recalls.

instead, hired new employees from the Paicines area.[5] Respondent has continued to use Paicines area employees for those operations since that date. It is clear that some Greenfield-based employees who had been working in Paicines in early 1992 were thereafter recalled to the Greenfield area. In addition, the records show that at least two employees, Argueta and Lucina Avila, who had worked the suckering season in 1991, did not work that season at any location in 1992 . Argueta credibly testified she was not recalled, while Avila did not testify.

As noted above, Respondent contested the Charging Party's certification and, as of May 7, 1992 was refusing to negotiate. On that date, Scott D. Scheid sent Gustavo Romero, the Charging Party's organizer, a letter reiterating its challenge to the certification, but advising that Respondent would be utilizing employees from South Monterey County for the Greenfield/San Lucas vineyards, and Hollister area employees for the San Benito County (Paicines) vineyards. The letter denied this hiring policy represented a change, but was instead an implementation of Respondent's original plan when it became manager of the Paicines fields. After disclaiming any obligation to negotiate the issue, Scheid offered to "consider any questions or concerns" the Charging Party had. The letter concluded by advising Romero that the suckering/training season was about to begin, and setting a

[5]General Counsel's Exhibit 3 lists 12 fulltime Paicines suckering employees in 1992, and an additional six who performed some suckering work. It is unclear whether additional employees were hired to perform training duties.

deadline of May 11, 1992 to contact him.

Romero replied by a hand-delivered letter dated May 8, 1992, requesting that Respondent negotiate what he described as a change in operations and displacement of bargaining unit members. Romero offered to meet on May 11 or May 12. In reply, Scheid sent Romero a letter dated May 11, denying Respondent had changed any past practice, and reiterating that Respondent had offered "to consider any questions or concerns" the Charging Party had, but not to conduct negotiations. The letter concluded by accusing Romero of bad faith, and terminating any further discussion of the issue. Romero replied by letter dated July 15, 1992, stating he had only requested negotiations for the issue of work at the Paicines fields, but as the representative of the unit employees, was now requesting contract negotiations. The parties never met to negotiate the issue.

2. The complaint, as amended, also alleges that Respondent violated §1153(e) by unilaterally changing the past practice of hiring its own employees for work in the grape harvest commencing September 2, 1992, by engaging a labor contractor to perform some of the work. Respondent admits it engaged a contractor without notice to the Charging Party, but denies this constituted a change in past practice. It contends that even if there was a unilateral change, the action was excused because it was implemented under emergency circumstances. Respondent further contends that no unfair labor practice took place, because all eligible employees were recalled for the 1992 harvest, other than a few who did not

return for reasons unrelated to the use of the labor contractor.

Respondent usually begins its grape harvest in early September. Gollnick testified, and the documentary records indicate, that September 8 was the first day of the 1992 grape harvest. The harvest must be performed when the sugar content of the fruit is proper for the winemaking process. The winemakers often give Respondent little notice of their grape orders, so this places additional limitations on Respondent's ability to allocate its labor resources. The 1992 grape harvest was substantially greater than the previous year, and therefore, Respondent required additional employees to do the work.

Gollnick testified that since Respondent did not have enough employees from the prior harvest to satisfy its labor requirements for 1992, and did not have enough time to train new employees, it engaged a labor contractor, Mendoza Farm Services. The evidence does not show when the decision was made to use a contractor, or when Respondent first contacted Mendoza. The labor contractor provided a maximum of 136 employees for the harvest, while a maximum of 235 employees of Respondent worked during that season. The contractor's employees primarily worked the Paicines fields, but some of them also worked in the Greenfield area.

Respondent and its predecessor, which have been in business since 1972, had only used a contractor for the grape harvest on one prior occasion, in 1989. Respondent has used contractors for other operations on many occasions, including some functions also performed by its own employees.

3. The complaint also alleges Respondent unilaterally changed its past practice of recalling employees by seniority when it failed to recall Argueta, Perez, and Segura for the 1992 harvest. Respondent admits none of these employees was recalled. The evidence, however, shows that none of them worked for Respondent during the 1991 harvest season. Argueta sought work and was hired (as opposed to being recalled) for the 1992 harvest season, beginning on the first day, September 8. Segura submitted a timely application for harvest work on an unspecified day in August or early September, but was not hired. Gollnick's uncontradicted testimony establishes that Perez did not apply for harvest work until all positions were filled. Perez did not testify. As noted above, the evidence fails to establish that Respondent rehires employees by seniority.

4. The complaint also cites, as an unlawful unilateral change, the failure to recall Argueta, Perez, Segura, Sosa and Rosas for pruning and tying work, commencing in the 1992 - 1993 season, in accordance with its seniority policy. The aforementioned employees have substantial pruning and/or tying experience with Respondent. The pruning usually begins in early December, and tying work is performed after the vines have been pruned. Pruning for the 1992-1993 season began in mid-December 1992. There is a conflict in testimony concerning when tying work began, with Respondent contending it was in mid-January 1993, while Rosas gave hearsay testimony that it began earlier. Rosas, however, admitted that any employees performing tying work before

she returned had more seniority.

Argueta, Rosas and Sosa performed pruning duties for Respondent during the 1991 - 1992 season, Perez only performed tying work, and Segura did not perform either function due to her pregnancy. With the exception of Segura, Respondent has expressed no complaint with the job performance of these employees. Gollnick testified that for the 1992 - 1993 pruning season, he implemented a requirement that in order to be considered for recall to pruning work, the employee must have performed a minimum of 400 hours of pruning work over the prior two seasons. There is no evidence that Respondent had ever previously maintained such a requirement. Gollnick described this as a "benchmark", but never really explained why it was necessary.

Respondent does not deny that Argueta, Rosas and Sosa lost employment as the result of this policy. Respondent's records show that at least three employees hired after December 1989 were recalled for pruning work in December 1992. Based on their hire dates, they could not have had more than one season of pruning experience with Respondent by the 1992 pruning season, fewer than Argueta, Rosas or Sosa. Argueta, Rosas, Sosa and Perez were recalled for tying work in mid-January 1993. Segura was not recalled or rehired for any work during the pruning/tying season.

5. The complaint alleges that Respondent's failures to notify the Charging Party of several personnel actions represent per se violations of §1153(e). These include the layoffs of Argueta, Perez, Rosas and Serrato in late May 1993; and the

changes in work assignments, reduction in work hours and layoff Mayorga.

With respect to May 1993 layoffs, the evidence shows that the four employees were performing suckering and training work until May 26, 1993. The suckering/training season was coming to an end, and Respondent laid off 20 employees after the shift on May 27. Unlike the prior layoffs experienced by these employees, they were transferred to another crew for one day, May 27, prior to being laid off. Respondent did this as part of a crew realignment. The records show that 30 employees were not laid off until June 4, 1993, and that others were retained until August 20. There is a conflict in testimony as to whether suckering work was performed after May 27, 1993. Given the number of employees who continued working after that date, and in light of the conclusion reached in this Decision, no finding is made on that issue. It is undisputed that replanting work was performed after the May 27 layoffs, but unclear whether any other type of work was performed.

With respect to the changes involving Mayorga, he was hired as a general laborer on January 10, 1983. While Mayorga has always performed a variety of job duties, he was increasingly assigned irrigation work and eventually became an irrigator. During the 1991 harvest season, Mayorga had, among other job assignments, driven tractors hauling gondolas to collect the crops, for a total of 120 hours. His primary other job assignment was irrigation. In September 1991, Mayorga worked a total of 252 regular and overtime hours; and from October 1 through 23, he

worked 237 hours.[6] Respondent admittedly decided to remove Mayorga's driving duties in 1992. His job duties during the 1992 harvest included irrigation, machine harvest, animal control and pesticide-related work.

It is undisputed that Respondent did not advise the Charging Party of this decision. Respondent contends that this change did not result in a reduction of hours. Respondent, however, includes August in its comparison, and the evidence clearly shows the tractor driving duties did not begin until September. In September 1992, Mayorga worked a total of 238 hours, 14 fewer hours than in September 1991. From October 1 through 23, 1992, Mayorga worked 214 hours, 23 fewer than October 1 through 23, 1991, and was then laid off.

The complaint does not allege Mayorga's 1992 layoff as a violation, but does allege that Respondent reduced Mayorga's working hours, commencing October 23, 1992, and laid him off for two weeks after the 1993 harvest, without notice to the Charging Party, thereby violating its bargaining obligation. Mayorga had been laid off two or three times each year until 1991, when he was only laid off after the harvest. The reduction in layoffs is explained by the increase in his irrigation assignments, and his apparent value as an employee. Mayorga's post-harvest layoffs, from 1983 to 1990, varied in duration from two weeks to about two

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[6]These figures are based on the days worked in the given month, and not on Respondent's monthly payroll totals, which overlap a few days from the prior month and omit a few days at the end of the month. Some other calculations in this Decision use the hourly figures listed in the monthly payroll totals.

months, although the more recent 1989 and 1990 layoffs were each about two weeks.

Mayorga was not laid off after the 1991 harvest season, because Respondent assigned him and other employees, who otherwise would have been laid off, to a special irrigation system installation project. Mayorga, however, had been laid off from March 20 to April 8 of that year. Mayorga, along with many other employees, was laid off after the 1992 and 1993 harvest seasons. His return from the 1992 layoff was delayed by a workers' compensation injury, until March 1993. The Charging Party was not notified of any of the layoffs.

Respondent contends that Mayorga has worked fewer hours since October 23, 1992 due to lawfully implemented layoffs and his injury, and because he worked an unusually high number of hours 1991. The evidence is to the contrary. Although Mayorga was not laid off after the 1991 harvest, he was laid off for over two weeks earlier in 1991, unlike in 1989 and 1990, so his 1991 hours are not atypical as a whole. While Mayorga's absence from work in 1993, until March 5 explains some of the reduction in hours, the records show he worked somewhat fewer hours after his return. Mayorga worked a total of 2,187 hours between March 6 and December 27, 1991. Mayorga worked a total of 1,925 hours between March 7 and December 24, 1993. Mayorga, on the average, was paid for 220 hours worked per month, for the period January 1991 through October 1992. Discounting 1991, Mayorga worked an average of even more hours during the period January - October 1992, averaging 228

hours per month. For the period, March through October 1993, Mayorga, on the average, was paid for 207 hours per month.

What the record fails to establish is that Respondent made a conscious decision to generally reduce Mayorga's hours.[7] In addition, while overall, he did work less, there are substantial variations above and below the average monthly hours in 1993, and at times, he worked as many hours as he had in previous years. Similarly, while Mayorga was more likely to work 10-hour days prior to 1993, he still did so on many occasions in that year. There is no evidence, other than possibly with respect to the post-harvest layoffs, that other employees were assigned work Mayorga lost, or that the hours of Respondent's other employees remained constant.

## IV. The Alleged Discrimination

The complaint alleges that all of the above changes involving individual employees were also the result of unlawful discrimination by Respondent, which began manifesting itself after the February 26, 1992 election, in retaliation for the employees' union activity, and in the case of Mayorga, also for his involvement in charges filed against Respondent. Respondent admits that the employees, except Segura, engaged in activities in support of the Charging Party, and that it was aware of those

[7]This contrasts with the layoffs and elimination of driving assignment decisions, which clearly were made by Gollnick, in consultation with Respondent's supervisors.

activities.[8] Respondent, however, asserts that many other employees engaged in the same protected activities and were permitted to work during the disputed periods. Respondent admits it is opposed to unionization, but that its policy, given to all supervisors, was to not discriminate against UFW supporters. It contends the personnel decisions were based on unrelated business considerations.

It is undisputed that the named discriminatees, other than Segura, began wearing union caps and/or buttons after the election, attended pro-union rallies in front of Respondent's office during approximately the one to three month period following the election and signed a petition demanding Respondent not file objections to the election. Some of the alleged discriminatees were among those who entered Respondent's office and handed the petition to Gollnick. It is also undisputed that many other employees engaged in these activities.

On the other hand, Mayorga, on two occasions, was involved in one-on-one discussions regarding the Charging Party, initiated by Respondent's management. During the election campaign, Labor Consultant Highfill interrupted Mayorga's work to give him a flyer, and to tell him not to be brainwashed by the Charging Party, which was no good. About one month after the election, Supervisor Rayas, who was also present during at least some of the

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[8]Gollnick denied knowledge of certain activities by some of the alleged discriminatees. Irrespective of whether those denials should be credited, Respondent stipulated it was aware of activities in support of the Charging Party by all of the named employees, except Segura.

demonstrations, approached Mayorga and told him the union was no good, and that other companies with unions had failed. Rayas predicted that with the Charging Party, there would be many changes, and soon the employees would be "following the contractors' bathrooms looking for work," and earning $4.00 or $5.00 per hour. Mayorga responded that his father was receiving a union pension, and he thought the union was good.[9] Mayorga is one of three employees named in the charge in Case No. 92-CE-114-SAL, filed by the Charging Party, and served on Respondent by mail on September 30, 1992, regarding the assignment of gondola tractor driving duties.

Rosas (and apparently Mayorga) were interviewed on television after one of the demonstrations, and Gollnick admits having seen Rosas' interview. Sosa, in addition to her other activities, acted as an observer in the election. Rosas, Sosa, Argueta and Serrato were also involved in incidents where Rayas, apparently on orders from Gollnick, told them to either remove UFW flags placed on their vehicles (Sosa was a passenger in Rosas' car) or move the vehicles off Respondent's property. About ten vehicles had flags placed on them in the two incidents, which took place in early 1993.[10] As Respondent points out, three other employees involved

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[9]These facts are based on Mayorga's credited testimony. Highfill did not testify. Rayas did not deny that he had a conversation about the Charging Party with Mayorga, but did deny he said anything about changes in working conditions. Thus, there is only one portion of Mayorga's testimony which is contested, and he is credited, primarily based on his impressive demeanor as a witness.

[10]The testimony concerning these incidents is undisputed.

in these incidents were permitted to work during the disputed periods.

With respect to Segura, she was hired on January 5, 1983, as a pruner. She subsequently performed tying, suckering, training and harvest work. Segura last worked for Respondent on June 20, 1991, the end of the suckering season. She did not work the harvest or pruning/tying season in 1991, because of her pregnancy. Segura testified, without contradiction, that she informed Respondent of her pregnancy and inability to work.

According to Segura, she went to Respondent's office, in March or April 1992, and reported she was ready to return to work. Respondent disputes this, and Cynthia Chavez, Respondent's Payroll Clerk, testified that Segura did not seek employment from her. It is undisputed, however, that prior to the 1992 harvest, Segura again sought employment, and Martinez had her submit a written application, pursuant to Respondent's rule requiring employees who have not worked for over one year to reapply. If Segura were not interested in employment, as Respondent contends, why would she have submitted the application? It is found that Segura did inform Respondent she was ready to return to work in March or April 1992, probably speaking to someone other than Chavez. There is also a conflict in evidence as to whether Segura sought employment from Respondent after the 1992 harvest, which need not be resolved.

Segura testified that she attended three or four demonstrations at Respondent's offices after the election,

including the demonstration where employees handed Gollnick the petition. According to Segura, she wore a union button, and carried a flag during the demonstrations. Segura testified that she and the other demonstrators were observed by Rayas, who used binoculars. Chavez testified she did not observe Segura at any demonstration, but Rayas did not deny having observed Segura engaged in such activity.

Gollnick denied seeing Segura at the demonstrations, or having any knowledge of her union activities. Gollnick denied he recalls the identity of any employee present during the demonstrations, despite the fact that over 20 entered his office and handed him the petition. Gollnick also initially denied that Segura voted in the election when, as Segura credibly testified, she voted a challenged ballot. Finally, Gollnick denied any knowledge of Perez' union activities, after Respondent stipulated to such knowledge. Based on the foregoing, it is found that Segura did engage in protected activities prior to the 1992 harvest, and Respondent knew this.[11] Segura was one of three employees named in the charge in Case No. 92-CE-ll-SAL, pertaining to the failure to recall employees during the 1992 harvest, which was served by mail on September 14, 1992.

Most of the facts concerning Respondent's alleged failure to recall or rehire Perez, Argueta and Segura for the 1992 harvest, the failure to recall Argueta, Perez, Rosas, Sosa and Segura for

[11]Although Segura's name is not on the petition handed to Gollnick, it appears the signatures were gathered prior to the rally at which it was delivered.

the 1992 - 1993 pruning and tying season, and the May 27, 1993 layoffs of Argueta, Perez, Rosas and Serrato are set forth above. With respect to Segura, Gollnick testified she was not rehired because of the break in her service, her alleged failure to keep in contact with Respondent and because, "In consultation with my supervisors, we didn't think of her as a particularly productive employee." Respondent produced no evidence to show that other employees have been denied employment for failing to contact it during pregnancy leaves, and the credible evidence shows that Segura did, in fact contact Respondent during and after her pregnancy. Beyond Gollnick's general testimony contending Segura was a slow worker, and some evidence that Segura earned the minimum hourly rate instead of piecerate for an unspecified period of time, Respondent produced no other evidence showing why, aft nine years, her work became unacceptable. Notably, none of the supervisors testified concerning Segura's job performance.

With respect to Mayorga, in addition to contending he essentially lost no hours as the result of being removed from his tractor driving duties, Respondent contends the elimination of this work resulted from the need to have Mayorga prepare the fields for pesticide spraying, to conduct the spraying and perform required post-spray duties. Mayorga and Gollnick gave highly differing estimates as to the amount of time Mayorga performed those duties, with Mayorga estimating about six days, and Gollnick, several weeks. Mayorga is credited, inasmuch as he was generally a more convincing witness, has more first-hand knowledge

of what his duties were, and is more strongly supported by the work records.

At the time of Mayorga's layoffs in 1992 and 1993, Respondent employed two other irrigators, Roberto Torrez and Octaviano Rodriguez. Neither was laid off in those years, and employees in other job classifications were also retained. Respondent contends this is because they are "permanent" employees, while Mayorga is not. The evidence shows that Torrez has not been laid off since after the 1987 harvest. Rodriguez, however, was laid off after the 1990 harvest. Both Rodriguez and Torrez have worked for Respondent considerably longer than has Mayorga. The record discloses that some of Respondent's most highly valued employees, including some of the foremen/crew leaders, are subject to seasonal layoffs.

## ANALYSIS AND CONCLUSIONS OF LAW

### I. The Alleged Bargaining Violations

Once a labor organization is elected to represent employees, the employer is bound to meet and negotiate with the representative concerning the terms and conditions of unit members' employment. The obligation extends to significant changes in working conditions, and to changes in employment practices, whether established by contract or past practice. Katz v. NLRB (1962) 369 U.S. 736 [50 LRRM 2177]; Tex-Cal Land Management. Inc. (1982) 8 ALRB No. 85. De minimis changes which do not amount to generalized changes in policy or working

conditions do not constitute bargaining violations. Cattle Vall Farms, et al. (1982) 8 ALRB No. 59; Santa Rosa Blueprint Service, Inc. (1988) 288 NLRB 762 [130 LRRM 1403]. An employer acts at its peril by refusing to give the certified representative notice and the opportunity to bargain concerning changes in existing terms and conditions of employment, even if it is contesting the certification. Gerawan Ranches (1992) 18 ALRB No. 16; George Arakelian Farms, Inc. v. ALRB (1986) Cal. App. 3d 94 [230 Cal. Reptr. 428]; NLRB v. Advertisers Manufacturing Company (C.A. 7, 1987) 823 F.2d 1086.

It is concluded that the decision to hire new employees from the Paicines area, for the 1992 suckering and training season, instead of using employees recalled by classification seniority, did constitute a change in Respondent's hiring practices. Whatever Respondent's preference had been in hiring locally, the only past practice for this major operation had been to use employees from the Greenfield area. Even Respondent's witness, Chavez, admitted that employees who work the prior season are given a preference in recall. In this case, some eligible employees were not even considered for recall. In addition, Respondent has engaged contractors who hire employees who do not live near the work locations. Furthermore, the local preference had not been seriously tested in the past, because Respondent's operations were all located in a relatively small geographic area. It is well established that a change in seniority hiring policies must be accompanied by notice and the opportunity to bargain.

Engineered Control Systems (1985) 274 NLRB 1308 [119 LRRM 1031]; Hamilton Electronics Company (1973) 203 NLRB 206 [83 LRRM 1097]; Accurate Die Casting Company (1989) 292 NLRB 982 [131 LRRM 1706]; Facet Enterprises. Inc. (1988) 290 NLRB 152, 179 [131 LRRM 1114].

Even if the evidence failed to show that Respondent recalled employees by seniority, the decision to hire new employees for the Paicines fields had a variety of ramifications for unit employees, and therefore required notice to the Charging Party and the opportunity to bargain. First, the decision resulted in the transfer of employees who had worked there during the 1992 pruning/tying season to the Greenfield area.[12] It is established that a permanent or longterm transfer of employees is a change in their terms and conditions of employment which requires notice and bargaining. Stone & Thomas (1975) 221 NLRB 573 [90 LRRM 1569]; Alamo Cement Company d/b/a San Antonio Portland Cement Company (1985) 277 NLRB 309 [121 LRRM 1268] ; Otis Elevator Company. A Wholly Owned Subsidiary of United Technologies (1987) 283 NLRB 223 [124 LRRM 1334]; Hamilton Standard Division of United Technologies Corp. (1989) 296 NLRB 571 [132 LRRM 1240]. In similar manner, the action resulted in a transfer of unit work from one group of employees to another. The Board has found this to require notice and bargaining. Pleasant Valley Vegetable Co-Op (1986) 12 ALRB No. 31.

Second, at least two employees eligible for recall for the

[12]Even accepting Respondent's contention that the relocation of the employees to the Greenfield area was beneficial, such beneficial changes in working conditions are still negotiable.

1992 suckering/training season did not obtain employment, apparently because of the change in policy. Since Respondent's recall policy requires classification employment in the prior season, the change potentially affected recall rights in future seasons. Also, by hiring all new employees for Paicines, employees who may well have been able to work a longer season by working at both Paicines and Greenfield, lost that opportunity. By hiring new employees to work in Paicines, Respondent substantially increased the size of the bargaining unit. Those new employees were entitled to representation as to how they would be hired and laid off, and their wages, hours and other terms and conditions of employment.

While Respondent did give the Charging Party some notice of its intended action,[13] it did not offer to negotiate and, in fact, refused to do so. Regardless of Gollnick's personal intentions, the only communications received by the Charging Party were the letters of May 7, May 11 and July 21, 1992. The May 7 letter specifically denied any obligation to negotiate, and only offered to "consider any questions or concerns" the Charging Party had. This is a far cry from collective bargaining. Furthermore, contrary to Respondent's claim, Romero's response of May 8, 1992 was not a demand to negotiate an agreement, but a request to

[13]Arguably, said notice was untimely. Respondent admittedly knew it was not going to use Greenfield-area employees in Paicines for the suckering/training season in December 1991. Nevertheless, Respondent waited until May 7, 1992, more than two months after the election, to give notice, stating time was now of the essence. The evidence does not disclose when the suckering work in Paicines actually began.

negotiate the displacement of Greenfield employees. It was Respondent, in reply to this letter, that terminated any further discussion on the issue, in the process again denying any willingness to conduct negotiations. To the extent that the Charging Party subsequently demanded contract negotiations, said demand had no impact on Respondent's refusal to negotiate the issue of work in Paicines, and at any rate, did not excuse a refusal to discuss the change in operations. Accordingly, since Respondent failed and refused to negotiate this unilateral change, it thereby violated §1153 (a) and (e) of the Act.

It is also concluded that Respondent unlawfully failed to give notice, or the opportunity to bargain concerning its decision to engage a contractor for the 1992 harvest. The Board has repeatedly held that both the decision and effects of such changes in hiring practices are subject to negotiations. Tex-Cal Land Management. Inc. (1982) 8 ALRB No. 85; Tex-Cal Land Management, Inc. , et al. (1986) 12 ALRB No. 26; Roberts Farms. Inc. (1987) 13 ALRB No. 14. It is not a valid defense to argue that no work was lost by virtue of the contracting decision, since the change still affects terms and conditions of employment for unit members. Tex-Cal Land Management, Inc. (1982) 8 ALRB No. 85; Albert Valdora, Inc. , et al. (1984) 10 ALRB No. 3. In this case, the decision again greatly expanded the size of the bargaining unit. The Charging Party was entitled to negotiate, on behalf of existing unit members, whether they could perform the additional work, and whether it could refer potential employees, rather than using a

contractor. Once the contractor was engaged, its employees, as unit members, were entitled to representation. Thus, it would be necessary for the Charging Party to be notified as to the identities of these new employees, so it could ascertain their desires concerning wages, hours and other terms and conditions of employment. Clearly, none of these interests was served, because no notice was given.

Respondent's argument, that no change in practice occurred, is rejected. While Respondent had engaged contractors for other types of work, the harvest is a distinct and major operation, and the practice for such work should be separately considered. With respect to the prior use of a contractor in harvest operations, this has taken place only once in over 20 years, and the practice for the preceding two years had been to use Respondent's employees.

Respondent's argument, that its action is excused due to emergency labor requirements is also rejected. In Charles Malovich (1983) 9 ALRB No. 64, the Board excused the late notice of engaging a contractor, where notice was given only two days after the contracting took place, based on emergency circumstances. The Board held that such circumstances are to be considered on a case-by-case basis. In addition to Respondent's failure to ever give notice, in this case, the evidence concerning the alleged emergency circumstances is unpersuasive. Clearly, most of the increase in Respondent's grape harvest resulted from its assuming management of the Paicines fields, in December 1991.

Respondent was well aware, substantially prior to the 1992 harvest, that absent unforeseen setbacks, its harvest would be substantially greater than before the acquisition. Indeed, had the Charging Party been given early notice of the expected increase in labor needs, it well might have been able to refer applicants for hire by September. Furthermore, while Respondent generally has less notice of when the harvest will commence than with other operations, it can predict the approximate date, and pre-plan its workforce. Therefore, Respondent violated §1153(a) and (e) by unilaterally engaging the contractor for the grape harvest.

The evidence fails to establish that Respondent changed its recall or rehiring policy by not rehiring or recalling Perez, Argueta or Segura for the 1992 grape harvest. Since none of these employees had worked during the prior harvest, they were not eligible for recall under Respondent's policy and therefore, the failure to recall them did not change the practice. The evidence fails to establish that Respondent uses seniority for rehires, and the requirement that employees with substantial breaks in service complete new applications suggests the contrary. Furthermore, the evidence shows that Argueta was rehired, Perez was not rehired based on the unavailability of employment and the refusal to rehire Segura was unrelated to any policy concerning seniority. Based on the foregoing, these allegations will be dismissed.

Respondent, however, did violate §1153 (a) and (e) by unilaterally changing its recall practice for the 1992 pruning

season. It admittedly instituted a new requirement for employee-to be considered for recall, 400 hours of pruning over the prior two seasons. Respondent further admits that Argueta, Perez and Rosas, who otherwise would have been eligible for recall were not permitted to return to work until tying operations began, apparently because of this new requirement. Accordingly, the change had a general impact on the bargaining unit which required notice, and the failure to afford such notice violated the Act. Argueta, Perez and Rosas will be entitled to backpay if employees with less classification seniority were recalled or hired for pruning work.[14] Respondent did not change its policy with respect to Perez or Segura, because neither had performed pruning work during the prior season, and thus, they were not eligible for recall. Accordingly, those allegations will be dismissed.

With respect to the failure to give notice of the various layoffs, the National Labor Relations Board (NLRB) has on many occasions held that employers must give notice of economic layoffs and of discharges, and afford the collective bargaining representative the opportunity to negotiate the decision and effects of such actions. An exception to this rule is where economic layoffs result from a core entrepreneurial decision, such as the closure of a business or discontinuance of a product line, in which case notice is still required, but only the effects must

[14]It may be that other employees were not recalled for pruning work, in violation of Respondent's pre-existing policy. The complaint, however, only names the five employees, and it would be inappropriate to expand the allegation, absent an amendment.

be bargained. Lapeer Foundry & Machine, Inc. (1988) 289 NLRB 952 [129 LRRM 1001] ; Adair Standish Corp. (1989) 292 NLRB 890 [130 LRRM 1345] and (1989) 295 NLRB 985 [131 LRRM 1680]; United Gilsonite Laboratories. Inc. (1988) 291 NLRB 924 [131 LRRM 1035]; McCotter Motors Company (1988) 291 NLRB 764 [131 LRRM 1370]; Stamping Specialty Company. Inc. (1989) 294 NLRB 703 [131 LRRM 1740]; Ryder Distribution Resources. Inc. (1991) 302 NLRB 76 [138 LRRM 1058]; Onan. A Division of Ona Corp. (1984) 270 NLRB 373, 376 [116 LRRM 1203]. The obligation is not eliminated because the employer has a past practice of laying off employees when work is slow. Adair Standish Corp. (1989) 292 NLRB 890 [130 LRRM 1345]. The violation still exists even where the employer shows the layoffs would have occurred, even with bargaining. United Gilsonite Laboratories. Inc., supra.

One can hardly imagine a' more profound change in working conditions than a layoff or discharge, or a more important function for the collective bargaining representative than the preservation of employment. The evidence shows that while Respondent regularly lays off employees at the end of each operation, the business operates year-round. Thus, the layoffs are not the result of a closure or partial closure of business, or the discontinuance of a product line. The starting and ending dates for the various operations are not fixed, and Respondent does not necessarily lay off all employees on the same date. Some employees are retained after the general seasonal layoffs, and there is at least some evidence that employees who are laid off

are at least minimally qualified for some of the tasks performer by those who are retained. While the decision as to the starting or ending date of a season has been found to constitute a management prerogative, selection for layoff and order of layoff remain as decision-related issues which are amenable for collective bargaining and should be negotiated.[15]

Even if the layoff decisions are to be considered management prerogatives, the NLRB decisions cited above would require effects bargaining.[16] There are several effects-related issues which the Charging Party might wish to negotiate, such as notice to the employees, severance pay and maintenance or implementation of fringe benefits during the layoff period. Based on the foregoing, it is concluded that Respondent violated §1153 (a) and (e) by failing to give the Charging Party notice of, and the opportunity to bargain the decision and effects of the layoffs following the 1992 and 1993 harvest seasons, and the 1993 suckering and training season.[17]

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[15]Tex-Cal Land Management, Inc., et al. (1986) 12 ALRB No. 26. With respect to the negotiability of discharges, it is noted that if this subject were held nonmandatory, employers would apparently not be obligated to negotiate grievance procedures for such personnel actions.

[16]ln similar fashion, the Board, in Tex-Cal Land Management, Inc. , et al. (1986) 12 ALRB No. 26, held that while the decision to change the commencement date of operations is nonmandatory for bargaining, notice must be given to negotiate the effects.

[17]It is noted that the Board, in D'Arrigo Brothers Company. Inc. (1983) 9 ALRB No. 30, held the employer was not obligated to negotiate the layoff or discharge of an individual employee. The subsequent above-cited NLRB cases, and in particular Lapeer Foundry & Machine, supra, would appear to dictate a revision in analysis. In this regard, the bargaining obligations described

It is concluded that Respondent did not violate §1153(a) and (e) by failing to give the Charging Party notice that Mayorga's gondola tractor driving duties had been eliminated. Absent discrimination, such change did not have a generalized effect on the bargaining unit, and while Mayorga has lost some hours as the result of the change, it only applies to the harvest season. In the absence of discrimination, it is simply too burdensome to require an employer to give notice, and to bargain concerning relatively minor changes in job assignments. Santa Rosa Blueprint Service. Inc., supra.

As noted above, while the evidence may establish that Mayorga worked fewer hours overall after he returned from his workers' compensation injury, the figures fluctuate substantially. It has also been found that the evidence fails to show a decision by Respondent to generally reduce Mayorga's hours after his return. Therefore, there is insufficient evidence to establish, even assuming an obligation to give notice of this sort of change in one employee's hours, that there was, in fact, a general change in the assignment of hours to Mayorga. For these reasons, the allegation will be dismissed.

II. The Alleged Discrimination

Section 1152 of the Act grants agricultural employees the

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the National Labor Relations Act, 29 U.S.C.A. §158(a)(5) and §158(d) are indistinguishable from the parallel §1153(e) and §1152.2(a) of the Agricultural Labor Relations Act. Furthermore, the facts in D'Arrigo are distinguishable, because only one employee was involved, and the Board noted it was unnecessary to remedy the alleged bargaining violation, because parallel §1153(a) and (c) violations had been found.

right, inter alia, to form, join or assist labor organizations. Section 1153(c) makes it an unfair labor practice for an employer to discriminate against employees to encourage or discourage union membership. Section 1153(d) makes it an unfair labor practice to discharge or otherwise discriminate against an employee because the employee has filed charges or given testimony in a Board proceeding.[18] Retaliation by an agricultural employer against employees, because they engage in protected conduct, also constitutes interference, restraint and coercion with the rights set forth in §1152, and prohibited by §1153(a).

In order to establish a prima facie case of unlawful discrimination, the General Counsel must prove: (1) that the employee engaged in protected activity; (2) that the employer had knowledge of the activity; and (3) that a motive for the adverse action taken by the employer was the protected activity. Lawrence Scarrone (1981) 7 ALRB No. 13. Direct or circumstantial evidence may establish the unlawful motive. Circumstantial evidence includes evidence of animus toward employees who engage in protected activities, departures from established policies or procedures, the timing of the adverse action and shifting, inconsistent or false explanations given for taking such action. Miranda Mushroom Farm, Inc., et al. (1980) 6 ALRB No. 22.

Where the adverse action is a failure or refusal to rehire,

[18]Paragraph 15 of the complaint alleges that Respondent reduced Mayorga's hours because he filed charges with the Board, engaged in protected activity and without notice to or bargaining with the Charging Party. The complaint, however, does not allege the action as a violation of §1153(d).

the General Counsel must also show the employee made a proper application for work at a time it was available. Nishi Greenhouse (1981) 7 ALRB No. 18; Verde Produce Company (1981) 7 ALRB No. 27. If the employer has a practice or policy of contacting former employees to offer them reemployment, its failure to do so when employment is available may also satisfy this requirement. Kyutoku Nursery, Inc. (1982) 8 ALRB No. 98; Mission Packing Company (1982) 8 ALRB No. 47.

Once the General Counsel has established a prima facie case of unlawful discrimination, the burden shifts to the employer to rebut the charge. Respondent must preponderantly show that the adverse action would have been taken, even in the absence of the protected activity. Bruce Church. Inc. (1990) 16 ALRB No. 3.

The allegations concerning the failure to recall Perez, Argueta and Segura for the 1992 harvest season require no elaborate analysis. Simply put, the uncontradicted evidence shows they were not contacted by Respondent, because they had not worked during the previous harvest, and only employees who had done so were recalled. Accordingly, this allegation will be dismissed.

Similarly, the allegations regarding the refusals to hire Argueta and Perez for the 1992 harvest can be summarily dismissed. There was no adverse action taken against Argueta because she was, in fact, hired, and began work on the first day of the harvest. With respect to Perez, the uncontradicted evidence shows that she did not apply for harvest work until all the crews were filled. Accordingly, irrespective of any prima facie case which may have

been established, Respondent has met its burden to show that Per would still not have been hired, absent her protected activity.

General Counsel has established a prima facie case that Respondent refused to hire Segura for the 1992 harvest season in retaliation for her protected activity. The credited evidence shows that Segura took an active role in the UFW demonstrations and attempted to vote in the election, both protected activities. It has also been established that Respondent, through Rayas and Gollnick, were aware of Segura's protected activities. It is significant that Gollnick has been found to have untruthfully denied knowledge of Segura's participation in the rallies, and that she attempted to vote in the election.

While the timing of this action is not significant, the evidence shows that after the UFW election, Respondent embarked a series of unfair labor practices, commencing with the unilateral decision to no longer use Greenfield-area employees to work the Paicines fields. Despite Respondent's general no-discrimination policy, the record shows that Supervisor Rayas, who was amongst those from whom Segura sought employment, had expressed his strong dislike for the Charging Party, and predicted many changes and loss of employment. Gollnick, who made the ultimate decision not to rehire Segura, after consulting with his supervisors (presumably meaning, or at least including Rayas), showed his hostility toward employees who symbolically supported the Charging

Party by draping flags on their vehicles.[19]

Finally, there are the unsubstantiated allegations leveled against Segura by Respondent. Respondent contends Segura did not contact it, but the evidence shows she notified Respondent of her pregnancy and when she was able to return to work. Furthermore, Segura submitted a written application for the harvest season, at which time Martinez at least implicitly indicated to her she would be hired. Gollnick's vague reference to Segura's lack of productivity, as noted above, is uncorroborated by any specific testimony or documentary evidence. Considering Respondent's urgent labor shortage for the 1992 harvest, one would think they would have welcomed back an experienced employee, even if not the most productive.

Thus, the pretextual explanations for Respondent's action only serve to bolster General Counsel's prima facie case. Inasmuch as Respondent's alleged reasons for not hiring Segura have been discredited, the evidence fails to show that Segura still would not have been hired for the 1992 harvest, absent her protected union activity. Therefore, Respondent violated §1153(a) and (c).[20]

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[19]Although the flag incident took place after Segura was not rehired, it casts light on Gollnick's sentiments toward those who engage in protected activity. Furthermore, while evidence that other union activists are not subjected to discriminatory treatment is relevant, this is not conclusive to rebut otherwise compelling evidence of retaliatory conduct.

[20]The failure to rehire Segura is a continuing violation. Irespective of any alleged failure by Segura to contact Respondent after the 1992 harvest, she had done so previously and it is clear that continued efforts would have been futile.

The failure to give the Charging Party notice of the change in hiring requirements for the 1992 pruning season has been found to constitute a §1153(a) and (e) violation. With respect to the employees also alleged to have been discriminatorily denied recall for that work, the evidence shows that, irrespective of any prima facie showing of animus, Perez and Segura were not eligible for recall for pruning work, because neither had performed such work the year before. Perez was entitled to recall for tying work, and was recalled when such work became available. Segura was not eligible for recall to tying work, because she had not worked the prior tying season. Accordingly, the failure to recall Perez and Segura did not violate §1153 (c).[21]

As noted above, the evidence preponderantly establishes that Argueta, Rosas and Sosa would have been recalled by classification seniority for the 1992 pruning season, if Respondent had not changed its recall policy. Inasmuch as their eligibility for reinstatement and backpay will be the same under either §1153(e) or §1153 (c), the discrimination allegation is cumulative, and it will be dismissed for that reason. This conclusion makes it unnecessary to decide whether Respondent can succeed in its assertion that even given discriminatory motivation, these employees still would not have been recalled, based on its uniformly applied, albeit unlawfully implemented 400-hour

[21]Unlike the allegations concerning the 1992 grape harvest, the complaint does not allege the failure to hire (as opposed to recall) any of these employees as a violation. Accordingly, this issue will not be considered.

prerequisite.

Similarly, since Respondent's failure to give the Charging Party notice of the layoffs after the 1993 suckering/training season has been found to violate §1153 (a) and (e), a finding that the specific named individuals were discriminated against would be cumulative, and for this reason, the allegation will be dismissed.

It is concluded that General Counsel has established a prima facie case that Respondent discriminated against Mayorga, based on his union activities, when it took away his gondola tractor driving duties in 1992 and 1993. Although the conduct has been found insufficient to establish a unilateral change affecting the unit as a whole, it did constitute an adverse action, because Mayorga lost hours, and consequently wages as the result. Mayorga was a known union activist, who was twice singled out for one-on-one displays of animus by Respondent's supervisors/agents. Respondent's explanation for its action, Mayorga's other alleged job duties, rather than establishing a defense, adds to the prima facie case, because it has been found to be false. Since Respondent has failed to rebut the prima facie case, the action violated §1153(a) and (c).

It has already been concluded that Respondent violated §1153 (a) and (e) by laying off Mayorga in 1992 and 1993, without notice to the Charging Party. Since the remedy is substantially the same, it is unnecessary to decide whether Respondent also violated §1153(c) by the 1992 layoff, or §1153(c) and (d) by the 1993 layoff. The allegations will, therefore, be dismissed.

It has also been concluded that the evidence fails to show general decision by Respondent to reduce Mayorga's hours. Thus, while he worked fewer hours overall once he returned from the workers' compensation injury, these figures fluctuated to the degree that it cannot be said that the end result was the product of any individual decision. In order to establish a prima facie case of unlawful discrimination, the General Counsel must show that the harm suffered by the employee was the result of an adverse action by the employer. The evidence concerning this allegation fails to establish such action. As the result, the allegation will be dismissed.

## THE REMEDY

The Board, inter alia, requires an employer who has unilaterally changed terms and conditions of employment to cease and desist from such conduct, rescind the unilateral action upon request of the collective bargaining representative, reinstate employees who lost employment and make employees whole for economic losses. Robert H. Hickam (1984) 10 ALRB No. 2; D'Arrigo Brothers Company, Inc. (1983) 9 ALRB No. 30. Those remedies are appropriate in this case; however, where the complaint only names specific individuals as having been affected by the unilateral changes, the makewhole provisions will be limited to them.[22] It

[22]The allegations concerning the recall for work at Paicines and the use of the labor contractor are not limited to specific employees. Respondent contends no employee lost wages as the result of its use of the labor contractor for the 1992 harvest. While the failure to hire Segura did result from other

would be inappropriate to grossly expand Respondent's liability in this matter in the absence of an amendment to the complaint.

The NLRB typically orders reinstatement and backpay until bargaining is completed, where an employer unilaterally lays off employees for economic reasons which are amenable to decision and effects bargaining. Where the economic reasons for the layoffs do not turn on labor costs, and therefore only effects bargaining is required, reinstatement is not required, but a limited makewhole remedy is provided, under the terms set forth in Transmarine Navigation Corp. (1968) 170 NLRB 389 [67 LRRM 1419]. Lapeer Foundry & Machine, Inc., supra; Stamping Specialty Company, Inc., Supra.

The NLRB has repeatedly stated it will not cut off backpay, based on the likelihood that layoffs would have necessarily taken place, prior to compliance with an employer's decision and effects bargaining obligation. To do so would substitute its hindsight judgment for what should have been resolved through the bargaining process. Lapeer Foundry & Machine. Inc. , supra; McCotter Motors Company, supra. Nevertheless, in an industry where employment for most employees is clearly seasonal in nature, it would be inappropriate to order backpay for periods where there is virtually no chance the employee would have been working. In this regard the ALRB does not require immediate reinstatement for

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considerations, there at least remains the question whether Rosas and Juana Franco Aguirre lost hours. The issue of whether the contracting resulted in lost wages for these or any other employees will best be resolved in compliance.

seasonal employees, but reinstatement when the pertinent operate resumes.

The negotiable aspects of the decision to lay off seasonal workers after the 1993 suckering and training season included selection for layoff and order of layoff. Many employees were retained after the layoff, and it is not entirely clear what all of their job duties were. It is clear that Argueta, Perez, Rosas and Serrato should be made whole for the time that any other employee continued to perform suckering or tying work after their layoff, since the Charging Party was entitled to negotiate that they be retained. Furthermore, if any of them had experience in job functions (such as shoveling work) performed' by seasonal employees after their layoff, they should receive backpay for that period, since the Charging Party could have negotiated their retention for such functions. Based on the foregoing, the appropriate remedy will be to order backpay for the period commencing with the layoffs, and ending when the last seasonal employee who performed any function for which they had prior experience was laid off.

The above limitation does not apply to Mayorga,[23] because it cannot be said, as a certainty, that he would have been laid off after the 1992 and 1993 harvest seasons. Although Respondent argues that the failure to lay off Mayorga after the 1991 harvest

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[23]Again, although many other employees were laid off with Mayorga in 1992 and 1993, with no notice to the Charging Party, the failure to seek a remedy on their behalf makes it inappropriate to expand the complaint allegations.

was unusual, Mayorga possesses a variety of job skills, and the Charging Party might have been able to negotiate his retention. In addition, there was continuing irrigation work available, and Respondent might have been persuaded to retain him for this purpose, instead of, or along with the other irrigators.

Finally, the issue arises as to whether Mayorga's backpay would be tolled for the period of his absence due to injury. Although Mayorga missed over three months of work due to his injury, the evidence establishes that it arose in the course of his employment with Respondent. Unavailability for work under such circumstances does not toll backpay. Ukegawa Brothers, et al. (1990) 16 ALRB No. 18, at ALJD, page 132.

The Board orders reinstatement, backpay and a cease and desist order among the remedies for the unlawful refusal to rehire employees. Verde Produce Company, supra. These remedies, inter alia, are appropriate to remedy the refusal to rehire Segura for the 1992 harvest. Since Segura is experienced in all of the major seasonal operations, her reinstatement will be ordered as of the date of this Decision, if such operations are being conducted, or as of the first date of Respondent's next seasonal operation. Similarly, appropriate remedies for the discriminatory removal of Mayorga's gondola tractor driving duties would include reinstatement to those duties and that he be made whole for the economic losses he suffered.

Upon the basis of the entire record, the findings of fact and conclusions of law, and pursuant to section 1160.3 of the Act, I

hereby issue the following recommended:

## ORDER

Respondent Scheid Vineyards and Management Company, Inc., its officers, agents, labor contractors, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to meet and bargain collectively in good faith, as defined in Labor Code Section 1155.2(a), on request, with the United Farm Workers of America, AFL-CIO (UFW), as the certified collective bargaining representative of Respondent's agricultural employees.

(b) Instituting or implementing any changes in hiring or recall policies, without first notifying and affording the IT a reasonable opportunity to bargain with Respondent concerning such changes.

(c) Unilaterally laying off employees, without providing the UFW with notice and the opportunity to bargain concerning the decision to lay off employees, and the effects of that decision.

(d) Refusing to rehire, reducing the hours or otherwise discriminating against any agricultural employee because of membership in or support of the UFW, or any other labor organization.

(e) In any like or related manner interfering with, restraining or coercing agricultural employees in the exercise of

the rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

2. Take the following affirmative actions which are deemed necessary to effectuate the policies of the Act:

(a) Upon request, meet and bargain collectively in good faith with the UFW as the certified exclusive collective bargaining representative of its agricultural employees.

(b) Upon request of the UFW, rescind the unilateral changes in hiring and recall policies.

(c) Upon request, meet and bargain collectively in good faith with the UFW, concerning the changes in recall policy; the use of labor contractors to perform bargaining unit work; and the decision to lay off employees and the effects of the decision.

(e) Reinstate Luis Mayorga to his job duties as a gondola tractor driver during the harvest season, or if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges of employment.

(f) Reinstate Martha Segura Alvarez to her former position of employment, or if her position no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges of employment.

(g) Make whole all employees who have not been recalled for work in the Paicines area fields in accordance with their classification seniority, during the 1992 suckering and training season, and thereafter, for all losses in wages and other

economic losses they suffered, until such time as Respondent negotiates to agreement or impasse with the UFW, or the UFW fails to timely request bargaining, plus interest to be determined in the manner set forth in E.W. Merritt Farms (1988) 14 ALRB No. 5.

(h) Make whole all employees who were not recalled for employment during the 1992 harvest season, in accordance with their classification seniority, for all losses in wages and other economic losses they suffered, for the duration of the 1992 harvest season, plus interest.

(i) Make whole Juana Argueta Gutierrez, Irma Rosas and Leslie Sosa Flamenco for all losses in wages and other economic losses they suffered, plus interest, to the extent that Respondent failed to recall them for pruning work in accordance with classification seniority, commencing with the 1992 - 1993 season.

(j) Make whole Luis Mayorga for all losses in wages and other economic losses he suffered as the result of being removed from gondola tractor driving duties and his unilateral layoffs in 1992 and 1993, plus interest.

(k) Make whole Martha Segura Alvarez for all losses in wages and other economic losses she suffered as the result of not being rehired, commencing with the 1992 harvest season, plus interest.

(l) Preserve and, upon request, make available to the Board or its agents for examination, photocopying, and otherwise copying, all payroll records, social security payment

records, time cards, personnel records and reports and all other records relevant and necessary to a determination, by the Regional Director, of the backpay and makewhole period and the amount of backpay and makewhole due under the terms of this Order.

(m) Sign the attached Notice to Agricultural Employees, and, after its translation by *a* Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(n) Mail copies of the attached Notice, in all appropriate languages, within thirty days after the date of issuance of this Order, to all employees employed by Respondent at any time during the period from February 1, 1992, until the date on which said Notice is mailed.

(o) Post copies of the attached Notice, in all appropriate languages, for sixty days in conspicuous places on its property, the period(s) and place(s) of posting to be determined by the Regional Director, and exercise due care to replace any copy or copies of the Notice which may be altered, defaced, covered, or removed.

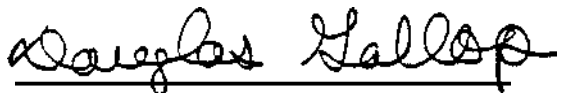
(p) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice in all appropriate languages to the assembled employees of Respondent on company time and property at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions employees may

have concerning the Notice and/or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all nonhourly wage employees to compensate them for time lost at this reading and during the question-and-answer period.

(q) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps which have been taken to comply with its terms. Upon request of the Regional Director, Respondent shall notify him or her periodically thereafter in writing of further actions taken to comply with the terms of this Order.

IT IS FURTHER ORDERED that the remaining allegations contained in the Second Amended Consolidated Complaint are hereby DISMISSED.

Dated: November 14, 1994



DOUGLAS GALLOP,
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges filed in the Salinas Regional Office by the United Farmworkers of America, AFL-CIO (UFW), the General Counsel of the Agricultural Labor Relations Board (Board) issued a complaint which alleged that we had violated the law. After a hearing in which each side had a chance to present evidence, the Board has found that we violated the Agricultural Labor Relations Act (Act) by changing some of our hiring and recall policies without first notifying and/or bargaining with the UFW as your representative, and by failing to give the UFW notice or the opportunity to bargain concerning the layoffs of employees. The Board also found that we violated the Act by discriminating against an employee, by refusing to rehire her, and another employee, by removing work previously assigned to him, because these employees joined, supported and/or assisted the UFW. The Board has told us to post and publish this Notice, and to mail it to those who have worked for us since February 1, 1992. We will do what the Board has ordered us to do.

We also want to tell you that the Agricultural Labor Relations Act is a law that gives you and all other farm workers in California rights:

1. To organize yourselves;
2. To form, join or help unions;
3. To vote in. a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the Board;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because it is true that you have these rights, we promise that:

WE WILL NOT make any changes in your wages, hours or working conditions, use labor contractors to furnish employees for the grape harvest or lay off any of our agricultural employees without notifying the UFW and giving it an opportunity to bargain about such changes and layoffs.

WE WILL NOT refuse to rehire, take away job assignments or otherwise discriminate against any agricultural employee because he or she belongs to or supports the UFW, or any other union.

WE WILL rescind our policies of not recalling employees in accordance with classification seniority for work in the Paicines area fields, and requiring 400 hours of experience in the prior two seasons to be eligible for recall to pruning work, until we have negotiated those policies with the UFW, on its request.

WE WILL recall employees for employment in accordance with their classification seniority, unless we notify the UFW of a different policy and negotiate the new policy with it.

WE WILL reimburse Juana Argueta Gutierrez, Teresa Perez, Irma Rosas, Lucina Serrato and Luis Mayorga for all losses in pay or any other economic losses they suffered as a result of our failure to bargain with the UFW, plus interest.

WE WILL offer Martha Segura Alvarez employment, and restore Luis Mayorga's former job duties as a gondola tractor driver/ and we will reimburse them for all losses in pay or other economic losses they suffered, plus interest.

Dated: SCHEID VINEYARDS AND MANAGEMENT COMPANY, INC.

By: _____
(Representative) (Title)

If you have any questions about your rights as farmworkers or about this Notice, you may contact any office of the Agricultural Labor Relations Board. One office is located at 112 Boronda Road, Salinas, California 93907-1899. The telephone number is (408) 443-3161.

DO NOT REMOVE OR MUTILATE